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No. 87-1211

In The

Supreme Court of the United States

October Term, 1987

TERRANCE L. GUIDER,
Petitioner,

v.

RONALD SMITH and CITY OF DETROIT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Ronald Smith and the City of Detroit, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Order of the Supreme Court of the State of Michigan, which denied Petitioner's Application for Leave to Appeal the decision of the Court of Appeals of the State of Michigan. The decision of the Supreme Court of Michigan is reported at 429 Mich. 858, 405 N.W.2d 126 (1987).

JURISDICTION

This Court has jurisdiction to review state court decisions in limited circumstances. That jurisdiction extends only to "[f]inal judgments or decrees rendered by

the highest court of a State in which a decision could be had . . . . " 28 U.S.C. § 1257 (1982). Petitioner seeks to have this Court review the refusal of the Michigan Supreme Court to exercise its discretionary jurisdiction to review cases. That refusal is not a "final judgment or decree" within the meaning of § 1257, and this Court does not have jurisdiction to review that decision.

STATEMENT OF THE CASE

Contrary to Supreme Court Rule 21.1(g), much of Petitioner's Statement of the Case is not "material to the consideration of the questions presented." However, in order to avoid any prejudice that may result from the inaccuracies contained in Petitioner's Statement, pursuant to Supreme Court Rule 34.2, Respondents' Statement of the Case will correct those inaccuracies.

Petitioner states that the facts in this case are "similar" to those in *Tennessee v. Garner*, 471 U.S. 1 (1985). Pet. for Cert., at 3. The instant case is distinguishable from *Garner*. In addition, factual similarities that may exist between this case and *Garner* are irrelevant to the issues presented in the Petition.[1]

Petitioner mischaracterizes the issues related to Respondent Smith's liability. Pet. for Cert., at 3 n.1. The issue is not whether Respondent Smith followed Detroit

[1]Questions regarding factual similarities and the retroactive application of *Garner, supra,* relate to the liability of Respondent City. As discussed in note 2, *infra,* these issues have not yet been finally resolved.

Police Department regulations, as Petitioner claims; rather, the issue currently pending before the Michigan Supreme Court is whether Respondent Smith was entitled to qualified good faith immunity under the standard established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Petitioner also contends that he "will remain the prevailing party regardless of the Michigan Supreme Court's disposition of the qualified immunity issue in Smith's case." Pet. for Cert., at 4 n.2. This contention is based on an erroneous understanding of the proceedings in the Michigan Supreme Court. Petitioner believes that he has obtained a final judgment as to the liability of Respondent City:

> "Smith and the City applied to the Supreme Court of Michigan for leave to appeal and that Court agreed to hear a single issue, namely whether the judgment against Smith should be reversed based on the doctrine of qualified immunity. (30a). The Supreme Court declined to review the decision that the City was directly liable to Guider on *Garner* grounds for the unconstitutional police department rule." Pet. for Cert., at 4 (footnote omitted).

The City's liability to Petitioner on the basis of this Court's decision in *Garner, supra*, has not been finally established.[2] Respondents Smith and the City filed a

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[2]If the Michigan Supreme Court decides that Respondent Smith was entitled to qualified immunity and, therefore, that no constitutional violation occurred, then Respondent City may not be liable for Petitioner's injuries. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). If the Michigan Supreme Court rules in Respondent Smith's favor, but Respondent City is still

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single Application for Leave to Appeal to the Michigan Supreme Court on April 1, 1987. On October 6, 1987, the Michigan Supreme Court granted the Application for Leave to Appeal. Although the Court limited the issue to qualified immunity, that Court obtained jurisdiction over the issues presented by Respondents.[3] Mich. Ct. R. 7.302(F)(3). Jurisdiction over those issues remains with the Michigan Supreme Court until a decision by that Court.[4]

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REASONS FOR DENYING THE PETITION

I. THE PETITION IS JURISDICTIONALLY DEFECTIVE.

This Court's jurisdiction to review decisions of state courts extends only to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision

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held liable under *Garner, supra,* then issues related to the retroactive application of *Garner* will likely form the basis for a Petition for Writ of Certiorari to be filed with this Court. Petitioner thus will not necessarily remain the "prevailing party;" Petitioner's status will remain in doubt until the rest of the issues in this case are resolved.

[3]The attorney's fee issues presented by Petitioner have been pursued on appeal as a separate matter.

[4]On October 26, 1987, Petitioner filed a Motion with the Michigan Supreme Court. In that Motion, Petitioner asked that the Michigan Supreme Court bifurcate this case and remand to the trial court that portion of it relating to Respondent City's liability for immediate entry of judgment against Respondent City. On December 2, 1987, the Michigan Supreme Court entered its Order denying Petitioner's Motion. That Order establishes that there is no final judgment against Respondent City.

could be had. . . ." 28 U.S.C. § 1257 (1982); *see Market Street Railway Co. v. Railroad Comm'n,* 324 U.S. 548, 551 (1944). This jurisdiction does not extend to the refusal of a state supreme court to exercise its discretionary jurisdiction to review decisions of intermediate state appellate courts.

This Court has long held that, where a state supreme court has declined to review a case, the decision of the last court to decide the merits is "the highest court of a State in which a decision could be had . . ." for determining the extent of this Court's jurisdiction. In *Western Union Tel. Co. v. Crovo,* 220 U.S. 364 (1910), this Court stated:

> "The plaintiff in error has sued out two writs of error: one to the law and equity court of the city of Richmond, the trial court, and another to the supreme court of appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the law and equity court was the highest court of the state to which the case could be carried, and a writ will therefore lie to that court if a Federal question is properly saved." *Id.* at 366.

In such cases, this Court's *jurisdiction* under 28 U.S.C. § 1257(3) properly runs to the state intermediate appellate court or trial court, whichever last ruled on the merits. *See Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 159-60 (1954); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1951); *Chicago & Eastern Illinois Railroad Co. v. Industrial Comm'n,* 284 U.S. 296, 297-98 (1932); *Western Union Tel. Co. v. Priester,* 276 U.S. 252, 258 (1928); *American Railway Express Co. v. Levee,* 263

U.S. 19, 20 (1923)[5]; *Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia*, 225 U.S. 264, 267-69 (1912); *Sullivan v. Texas*, 207 U.S. 416, 422 (1908); *see also Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

In this case, Petitioner has asked this Court for a Writ of Certiorari *to the Supreme Court of Michigan, not the Michigan Court of Appeals.* The Jurisdictional Statement in the Petition reads in its entirety:

> "Jurisdiction to review the judgment in question by writ of certiorari is provided by 28 U.S.C. § 1257(3). This petition is being filed within 90 days of the Supreme Court of Michigan's order of October 6, 1987." Pet. for Cert., at 2.

Under this Court's Rules, the Statement of Jurisdiction in a Petition must identify the "judgment or decree sought to be reviewed."[6] The caption of the Petition in

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[5]In *Levee*, Justice Holmes, for a unanimous Court, held:

> "A preliminary objection is urged that the present writ of certiorari was addressed to the Court of Appeal and not to the Supreme Court. But under the Constitution of the State the jurisdiction of the Supreme Court is discretionary, . . . and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, . . . when jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had." 263 U.S. at 20-21 (citations omitted).

[6]Sup. Ct. R. 21.1(e) provides:

> "1. The petition for writ of certiorari shall contain, in the order here indicated:

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this case states: "On Writ of Certiorari to the Supreme Court of Michigan." The "Opinions Below" Section of the Petition also refers to the Michigan Supreme Court's Order denying Petitioner's Delayed Application for Leave to Appeal. Pet. for Cert., at 2. That Order is included in the Appendix to the Petition. Pet. for Cert., at 29a-30a.

Petitioner repeatedly states that the Michigan Supreme Court "denied [his Delayed Application] *on the merits.*" Pet. for Cert., at 4 & n.3 (emphasis added). However, with regard to the denial of an Application for Leave to Appeal, the Michigan Supreme Court has adopted the position of this Court with regard to the denial of a Petition for Writ of Certiorari: that the denial is *not* a decision on the merits. *Frishett v. State Farm Mutual Automobile Insurance Company,* 378 Mich. 733 (1966); Mich. Ct. R. 7.321; *see also People v. Hines,* 88 Mich. App. 148, 152, 276 N.W.2d 550, *lv. denied,* 406 Mich 934 (1979); *Owendale-*

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* * *

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the *judgment or decree sought to be reviewed,* and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) Where a cross-petition for writ of certiorari is filed under Rule 19.5, reliance upon that Rule shall be expressly noted and the cross-petition shall state the date of receipt of the petition for certiorari in connection with which the cross-petition is filed.

(iv) The statutory provision believed to confer on this Court *jurisdiction to review the judgment or decree in question* by writ of certiorari." (Emphasis added).

Gagetown School District v. State Board of Education, 92 Mich. App. 719, 725, 285 N.W.2d 435 (1979), *aff'd*, 413 Mich. 1, 317 N.W.2d 529 (1982).

This Court should deny the Petition for Writ of Certiorari because, under the statutory grant of power embodied in 28 U.S.C. § 1257 and clarified in *Crovo, supra* and the other cases cited previously, this Court's jurisdiction to review decisions of state courts does not extend to a state court's refusal to exercise its discretionary power to hear cases. The Order of the Michigan Supreme Court denying Petitioner's Delayed Application for Leave to Appeal was just such a discretionary refusal to take jurisdiction over the attorney's fee issues.[7] This Court should deny the Petition for this reason alone.

II. THIS COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI AS THE PETITION DOES NOT SHOW THE EXISTENCE OF A CONFLICT THAT WARRANTS THIS COURT'S CONSIDERATION.

Petitioner asks this Court to grant certiorari in this case because of an alleged conflict between the decisions of the Michigan state courts in this case and the decisions of various Federal Courts of Appeals. Pet. for Cert., at 5, 8-11, 12.[8] Because the decisions of the Michigan state

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[7]Under the court rules in Michigan, the Michigan Supreme Court does not obtain jurisdiction unless and until it grants an Application for Leave to Appeal. Mich. Ct. R. 7.302(F)(3).

[8]This Court will grant certiorari on the basis of conflict only where a true conflict in principles of law exists; factual conflicts will not support review by this Court. *Wisconsin Electric Co. v. DuMore Co.*, 282 U.S. 813 (1931); *Sanchez v. Borras*, 283 U.S. 798 (1931); *see also Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923).

courts are consistent with the language and intent of the Civil Rights Attorney's Fees Act of 1976 hereinafter "§ 1988" or "the Act"),[9] and because no true conflict exists, Respondents urge this Court to deny the Petition for Writ of Certiorari.

A. The "Bright Prospects" Doctrine Is Consistent With The Statutory Language And Legislative History Of 42 U.S.C. § 1988.

A review of § 1988 and its accompanying legislative history leaves little doubt that Congress intended that the decision to award or deny attorney's fees under the Act was to be within the sound discretion of the trial judge. The so-called "bright prospects" approach to the award of attorney's fees under § 1988 is just one legitimate approach to the exercise of that judicial discretion.

Following this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), Congress enacted 42 U.S.C. § 1988, which provides that a court "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." In adopting § 1988, Congress explicitly rejected the mandatory imposition of attorney's fees in civil rights cases.[10]

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[9]42 U.S.C. § 1988 (1982).

[10]The House Report on § 1988 states:

> "The second key feature of the bill is *its mandate that fees are only to be allowed in the discretion of the court.* Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the *discretion* of the judge, guided of course by the case law interpreting similar

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Courts have recognized the discretionary nature of fee awards under § 1988. *Blum v. Stenson*, 465 U.S. 886 (1984); *Johnson By Johnson v. Brelje*, 701 F.2d 1201 (7th Cir. 1983); *Stone v. City of Wichita Falls*, 668 F.2d 233 (5th Cir. 1983); *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980).

The express purpose for the passage of § 1988 was to provide a means to ensure that plaintiffs in civil rights cases would have access to the judicial system. Congress intended that § 1988 would provide the necessary access to those plaintiffs without the financial resources necessary to hire competent counsel. The legislative history of the Act brings home this point:

> "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, [the Attorney's Fee Award Act] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." House Report, at 1.

The Senate Report contains similar statements of the legislative intent. Senate Report, at 5909-10; *see Evans v. Jeff D.*, 475 U.S. 717 (1986).

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> attorney's fee provisions. . . . The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460." H.R. No. 94-1558, 94th Cong., 2d Sess., September 15, 1976, at 8 (emphasis added and in original, footnote omitted) (hereinafter "House Report").

The Senate Report also recognizes the discretionary nature of § 1988. S.R. No. 94-1011, *reprinted in* 1977 U.S. Code Cong. & Ad. News 5908, 5909 (hereinafter "Senate Report").

One method of determining whether to award attorney's fees under § 1988 is the so-called "bright prospects" rule, applicable to cases in which a plaintiff seeks relief in the form of monetary damages. This approach focuses on whether the *facts* of a particular case would have prevented or significantly inhibited a plaintiff from obtaining competent counsel. Where it is determined that the case was sufficiently appealing to enable a client to attract counsel, the trial court may exercise its discretion under § 1988 to deny an award of fees. In this case, the trial court applied this analysis to deny Petitioner's request for a fee award, and the Michigan Court of Appeals upheld the trial court's exercise of discretion.

The first case adopting the bright prospects rule was *Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979). In *Zarcone,* the Second Circuit Court of Appeals affirmed a denial of attorney's fees because of the absence of any "financial disincentive" for Plaintiff to obtain counsel. 581 F.2d at 1044. The Second Circuit looked to the rationale behind Congress' enactment of § 1988—the attraction of competent counsel in civil rights cases—and held that the trial court is to consider this purpose in the exercise of its discretion in determining whether to award attorney's fees.

The Second Circuit adopted the rule that:

> "where a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis, the underlying rationale of the *Newman-Northcross* rule may be inapplicable since no financial disincentive

or bar to vigorous enforcement of civil rights may exist." *Id.*[11]

The Court looked at the particular factual circumstances in that case as to both liability and damages in determining whether Plaintiff had sufficiently bright prospects to obtain private counsel to enforce his civil rights claims. *Id.* Contrary to Petitioner's assertions, the bright prospects rule does *not* focus solely on the existence of a contingent fee contract. Other courts have followed the *Zarcone* approach. *Kerr v. Quinn,* 692 F.2d 875 (2d Cir. 1982); *Wheatley v. Ford,* 679 F.2d 1037 (2d Cir. 1982); *Milwe v. Cavuoto,* 653 F.2d 80 (2d Cir. 1981); *see also Buxton v. Patel,* 595 F.2d 1182 (9th Cir. 1979); *Eide v. Kelsey-Hayes, Inc.,* 154 Mich. App. 142, 197 N.W.2d 532 (1986), *lv. granted and lv. to appeal as cross-appellant denied,* 428 Mich. 873, 402 N.W.2d 468 (1987) (adopting bright prospects for use with the state civil rights statute).

Petitioner cites *Cooper v. Singer,* 719 F.2d 1496 (10th Cir. 1983) (en banc) and *Sanchez v. Schwartz,* 688 F.2d 503 (7th Cir. 1982), for the proposition that the bright prospects rule does not meet the *three* purposes of § 1988. The claim that there are three purposes for § 1988 is unsup-

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[11]Congress recognized that § 1988 would largely benefit those plaintiffs seeking injunctive relief. House Report, at 9. The House Report quoted with approval from *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (per curiam):

> " 'If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the *injunctive* powers of the federal courts.' " House Report, at 6 (emphasis added).

Congress did recognize that, in cases where plaintiffs' damages remedies are limited, attorney fees are necessary to secure effective representation. House Report, at 9.

ported by the statutory language and the legislative history.

Based solely on the decision in *Cooper, supra,* Petitioner claims that § 1988 serves the following purposes: (1) attraction of competent counsel; (2) punishment; and (3) deterrence. Pet. for Cert., at 9 (citing *Cooper, supra,* at 1501-1502). However, the notion that an award of attorney fees under § 1988 was meant to punish defendants and to deter civil rights violations is unsupported by the legislative history of the Act.

The view of Petitioner and of the Court in *Cooper, supra,* that there are three purposes that § 1988 was meant to serve is unfounded. The *Cooper* Court cites to *Sanchez v. Schwartz,* to support that proposition. The only citation in either case is to a student comment in the University of Chicago Law Review. Comment, *Attorney's Fees in Damage Actions under the Civil Rights Attorney's Fees Awards Act of 1976,* 47 U. Chi. L. Rev. 332 (1980).

The legislative history of the Act indicates that the sole purpose for this statute was to provide an incentive for competent counsel to undertake representation of plaintiffs alleging violations of their civil rights, particularly in cases seeking injunctive relief. Nothing in the legislative history supports the idea that punishment or deterrence were motivating factors in Congress' passage of the statute.[12]

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[12]The reading given to § 1988 and the delineation of its purposes by Petitioner and the Courts in *Cooper, supra,* and *San-*

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The bright prospects approach is consistent with § 1988's purpose to ensure that plaintiffs alleging civil rights violations have sufficient access to courts. The bright prospects approach focuses on whether, at the time that counsel is retained, the prospects for success are sufficiently bright that plaintiff would not have trouble attracting competent counsel to pursue a civil rights claim. *Kerr v. Quinn, supra,* at 879.

B. The Decisions Of The Michigan State Courts In This Case Do Not Conflict With The Attorney's Fee Cases From Other Jurisdictions Cited In The Petition.

The primary reason advanced by Petitioner for this Court to grant a Writ of Certiorari in this case is that the decisions of the Michigan state courts conflict with decisions of various circuit courts, decisions of this Court, and Congress' intent under § 1988.[13] A careful analysis

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chez v. Schwartz, supra, not only is without basis in the legislative history, but would make the punishment and deterrent purposes redundant with 42 U.S.C. § 1983 (1982) and the other civil rights statutes, since those substantive statutes are designed to satisfy the punishment and deterrence aims. Moreover, the Courts provide no evidence that the extra amount of money paid in attorney's fee awards under § 1988 above the Judgment would result in any extra amount of deterrence.

Further, the punitive rationale assumes that good faith litigation of civil rights claims is "obstructive." Petitioner's position on this contradicts his argument that there were very dim prospects for his recovery in this case. If those prospects were indeed dim, then the awarding of fees under a punitive purpose rationale would punish Respondents for litigating a case which they had a good chance of winning.

[13]As discussed in Argument II.A., *supra,* the bright prospects approach is entirely consistent with, and advances, the congressional intent.

of each of the cases cited by Petitioner reveals that no such conflict exists. Each of those cases is distinguishable either on the facts or on the issues of law presented.

Petitioner flatly states that the Seventh, Ninth and Tenth Circuit Courts of Appeals have "expressly repudiated" the bright prospects doctrine. Pet. for Cert., at 8-11. The cases relied upon by Petitioner[14] for this proposition in fact do not involve application of the bright prospects test as enunciated in *Zarcone, supra* and subsequent cases.

Petitioner first cites *Cooper, supra,* as expressly rejecting the bright prospects rule. In that case, however, the bright prospects doctrine as enunciated in *Zarcone, supra* was ***not*** at issue. Rather, the issue in *Cooper, supra* was whether a contingent fee contract would limit the *amount* of a fee award. *Id.* at 1503. Thus the *Cooper* Court's discussion of *Zarcone* was *dictum.*

Although the Court in *Cooper* discussed *Zarcone,* it misstated the bright prospects rule:

> "Under this ["bright prospects"] rule, fees are not awarded to prevailing parties who are able to attract counsel through contingent fee agreements." *Id.* at 1501.

The Court in *Cooper* viewed the bright prospects rule as looking to whether a plaintiff had *in fact* obtained counsel on a contingent fee basis, regardless of the prospects for success based on the facts of that plaintiff's case. The

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[14]Those cases are *Cooper, supra; Jones v. Wilkinson,* 800 F.2d 989 (10th Cir. 1986), *aff'd sub nom., Wilkinson v. Jones,* — U.S. — (1987); *Sanchez v. Schwartz, supra; Kirchoff v. Flynn,* 786 F.2d 320 (7th Cir. 1986); *Hamner v. Rios,* 769 F.2d 1404 (9th Cir. 1985).

rule announced in *Zarcone,* on the other hand, takes into account all the facts in the case and determines whether the prospects for success are bright enough that counsel would take the case. *Zarcone, supra,* at 1044. The *Zarcone* bright prospects rule would not allow the denial of an attorney fee under § 1988 merely because of the existence of a contingent feet contract, where the chances for success were dim *at the outset.*

The other cases cited by Petitioner as in conflict with the decisions of the Michigan state courts in this case also did not involve the application of the bright prospects rule as stated in *Zarcone.* The case of *Jones, supra,* was a case for *injunctive* relief and the issue there was whether corporate plaintiffs could be denied attorney fees because they had "deep pockets" and could afford litigation costs. *Id.* at 991. The Court in *Jones* recognized that the bright prospects doctrine was not relevant to its decision. *Id.* n.3.

In *Sanchez v. Schwartz, supra,* the Court, like the Court in *Cooper, supra,* mischaracterized the bright prospects rule as based on the notion that "a contingent fee contract *alone* will attract competent counsel to the case." 688 F.2d at 505 (emphasis added). Unlike the instant case, the Court in *Sanchez v. Schwartz* reviewed the decision of the trial court *to award* an attorney's fee under the abuse of discretion standard, and found no abuse. *Id.* Finally, the Court noted that the award of fees in that case was conditioned upon a waiver by Plaintiff's attorney of the contingent fee contract. *Id.* n.1.

In *Kirchoff, supra,* the issue was whether contingent fee contracts may be used as a measure in the computation of the amount of fees awarded under § 1988. *Id.* at

320. *Kirchoff* did not involve issues related to entitlement to fees. The Court's discussion of *Sanchez v. Schwartz* was *dictum*. The Court also recognized the distinction made between ordinary damages suits and suits to obtain injunctive relief or to set precedent, in which a monetary value is not ascertainable. 786 F.2d at 327.

In *Hamner, supra,* again the issue was whether the existence of a contingent fee arrangement *alone* could justify a denial of an attorney's fee award. *Id.* at 1405. The Court did, however, note that the existence of a contingent fee contract is one element that may be considered. The Court "emphasize[d] that a different case might be presented if a district judge concludes that fees should not be awarded based upon consideration of all the *Kerr* factors."[15] 769 F.2d at 1408. Contrary to Petitioner's assertions, the Court in *Hamner* did not overrule *Buxton v. Patel, supra.* Pet. for Cert., at 9-10. Rather, the decision in *Hamner* is consistent with *Buxton's* "admonition . . . that the presence of a contingent fee agreement is not necessary or sufficient to deny fees." *Hamner,* 769 F.2d at 1408 (citation omitted).

Other cases cited by Petitioner as being inconsistent with the bright prospects doctrine are also distinguishable. In *Sargeant v. Sharp,* 579 F.2d 645 (1st Cir. 1978), the issue before the Court was, once again, whether the existence of a contingent fee contract by itself justifies the denial of attorney's fees under § 1988. *Id.* at 649. The Court in *Sargeant* remanded the case for a redetermination by the trial judge of whether fees should be awarded and, if so, the amount to be awarded. *Id.* The Court is-

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[15]Referring to: *Kerr v. Screen Extras Guild,* 526 F.2d 67 9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).

sued its remand order because the trial judge had failed to hold a hearing on the attorney's fee request, thereby denying plaintiff procedural fairness, and had failed to adequately give the reasons for the denial. *Id.* at 647.

Petitioner cites *Sullivan v. Crown Paper Bd. Co.,* 719 F.2d 667 (3d Cir. 1983), for the idea that attorney fees are always to be awarded; the only issue is the amount. Pet. for Cert., at 10. The *Sullivan* opinion, however, does not support this proposition and, if it did, such proposition would read all discretionary language out of § 1988, contrary to the clear legislative intent. The issue in *Sullivan* was how the existence of a contingency fee would affect an amount awarded, not entitlement to an award. *Id.* at 668. In fact, the Court of Appeals reversed the lower court because the trial judge did *not* take into account the contingency fee contract in setting the amount of the award. *Id.*

Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980) did not involve application of the bright prospects doctrine. There, the trial judge had reduced the amount of the fee awarded because of the similarity between the civil rights claim and a state law wrongful death action. *Id.* at 1220. The opinion is not, as Petitioner asserts, inconsistent with the bright prospects doctrine. Similarly, the bright prospects rule is not inconsistent with the decision in *Hall v. Hall,* 738 F.2d 718 (6th Cir. 1984). *Hall* did not involve any discussion of the factors that comprise the rule. Rather, *Hall* is an aberrational case. In *Hall,* the trial judge had denied attorney's fees to plaintiff because plaintiff was "drunken, ill-mannered," "anti-social and obnoxious." *Id.* at 721. *Hall* has no relevance to bright prospects or the instant case.

Finally, Petitioner cites to this Court's plurality opinion in *Riverside v. Rivera,* 477 U.S. 561 (1986) to support his contention that the bright prospects rule is "flatly inconsistent" with this Court's decisions. This Court, in *Riverside,* merely rejected a proposal for a strict rule that attorney's fees be proportionate to damages awarded. In fact, the plurality opinion rejected that proposal because it did not meet the sole purpose of § 1988: to afford access to the legal system for plaintiffs alleging civil rights violations. 91 L.Ed.2d at 481. This Court stated:

> "Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort *but produce only small monetary recoveries." Id.* (emphasis added).

This Court's decision in *Riverside* is consistent with the bright prospects rule.

The cases cited by Petitioner to support his argument that the decisions of the Michigan State courts in ths case conflict with decisions of the Federal Circuit Courts and of this Court are distinguishable. Most of the cited cases do not involve the bright prospects doctrine as enunciated in *Zarcone, supra.* Because no real conflict exists, and because the bright prospects doctrine fulfills the purpose of § 1988, Respondents ask this Court to deny the Petition for Writ of Certiorari.

C. The Petition Does Not Present Issues Of Sufficient Significance To Warrant This Court's Review.

The Petition in this case does not present a question of sufficient significance to warrant this Court's exercise

of its extraordinary jurisdiction. Assuming for the sake of this argument only that everything stated in the Petition is correct, no significant issue of national importance is present by the Petition.

Petitioner claims that the "bright prospects" rule currently exists only as to cases brought in the Second Circuit and the Michigan State Courts.[16] Pet. for Cert., at 5. Petitioner states:

> "[The "bright prospects" rule] is still the rule in the Second Circuit. It is also an acceptable rule for federal civil rights cases brought into Michigan state courts, now that the Supreme Court of Michigan has declined to review the Court of Appeals conclusion that the bright prospects doctrine 'is supported by a substantial body of case law' (26a).
>
> * * *
>
> The 'bright prospects' exception created by the Second Circuit in *Zarcone* and reiterated in *Milwe, Kerr* and *DeFilippo* is not now accepted anywhere outside the Second Circuit and the state courts of Michigan." Pet. for Cert., at 5, 7.

Petitioner also states that he "is unable to locate *any* recent cases interpreting Section 1988 which even remotely suggests that similarity of the tort actions, substantial damages or a contingent fee agreement can be 'circumstances' rendering the award of fees unjust." Pet. for Cert., at 12 (emphasis in original).

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[16]As discussed previously, Respondents do not necessarily agree with Petitioner that the bright prospects doctrine has been "repudiated in every other federal circuit to have considered the issue . . . ." Pet. for Cert., at 5. However, for the sake of this argument, Respondents will assume that Petitioner is correct.

If Petitioner is correct that the bright prospects rule is only applied in Michigan and the Second Circuit, and if there have been no recent cases other than the instant case applying the bright prospects doctrine, then this case does not warrant this Court's exercise of its extraordinary jurisdiction.

III. THIS COURT SHOULD NOT GRANT THE PETITION FOR WRIT OF CERTIORARI TO REVIEW WHAT IS ESSENTIALLY A FACTUAL DETERMINATION MADE BY THE TRIAL JUDGE IN THIS MATTER IN THE EXERCISE OF HIS DISCRETION UNDER § 1988.

Petitioner also asks this Court to grant a Writ of Certiorari to decide whether the trial judge abused his discretion in denying Petitioner's request for attorney's fees in this case. The second question presented by Petitioner is:

> "Whether, assuming the 'bright prospects rule' is a permissible and desirable gloss on 42 USC § 1988, it is an abuse of discretion to deny attorney's fees on the basis of that rule in circumstances of the kind found in this case at the time counsel was retained." Pet. for Cert., at i.

Petitioner would have this Court review in detail the factual circumstances in this case and determine whether the trial judge abused the discretion afforded to him under § 1988, based solely on those factual circumstances.

Petitioner provides a lengthy discussion of his view of the facts in this case. At this point, Respondents need only point out the various internal inconsistencies in Petitioner's argument. Petitioner correctly points out that application of the bright prospects rule calls for the trial judge to view the prospects for success at the outset (i.e.,

when counsel is retained). Pet. for Cert., at 17. However, Petitioner then claims that the trial court in this matter was "speculating" in determining that Petitioner's prospects for success were bright. Pet. for Cert., at 16.

In additon, Petitioner cites to the Mediation Award in this case in support of his argument that his prospects for success were not bright. References to the Mediation Award are irrelevant under the appropriate standard, because no Mediation Award existed at the time that counsel was retained. By the same token, that Petitioner lost at trial as to Respondent City, and that Respondents have pursued this case on appeal, is entirely irrelevant to Petitioner's prospects for success *as viewed at the time that counsel was retained.*

Finally, Petitioner suggests that the law as to the use of deadly force against fleeing felons was not "established" at the time the Petitioner was shot. This position is diametrically opposed to Petitioner's previous position in the state courts that Respondent Smith was not entitled to qualified immunity under *Harlow, supra,* because the law was in fact clearly established at the time that Respondent Smith shot Petitioner.

This Court has long adopted the rule that it will not exercise its jurisdiction to review essentially factual determinations made by lower courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). In addition, this Court does not exercise its certiorari jurisdiction where the issue has no significance beyond that to the parties in the particular case. *Rice v. Sioux City Memorial Park Cemetary,* 349 U.S. 70, 74 (1955) ("Nor does

[this Court] sit for the benefit of the particular litigants.''). Petitioner would have this Court review the factual determination made by the trial judge in deciding that Petitioner's chances for success were bright at the outset. Certainly, this issue has no significance beyond this case.

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CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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